

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

v.

Jacob Richard Mendez,

Defendant.

No. CR-16-00181-001-TUC-JGZ (JR)

ORDER

On November 30, 2016, Magistrate Judge Jacqueline Rateau issued a Report and Recommendation (“R&R”) in which she recommended that Defendant Jacob Richard Mendez’s Motion to Suppress Evidence (Doc. 39) be denied.¹ (Doc. 60.) Defendant filed an Objection to the R&R on December 27, 2016. (Doc. 64.) The government filed a response on February 9, 2017. (Doc. 77.) For the reasons stated herein, the Court will adopt the R&R and deny Defendant’s Motion to Suppress Evidence.

STANDARD OF REVIEW

The Court reviews de novo the objected-to portions of the R&R. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for clear error the unobjected-to portions of the R&R. *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999);

¹ The R&R also recommended that Defendant’s Motion to Suppress Statements filed on September 26, 2016 (Doc. 46) be granted. The government did not file an Objection to the R&R. The Court has reviewed the record and concludes that Magistrate Judge Rateau’s recommendation with respect to Defendant’s Motion to Suppress Statements is not clearly erroneous. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *see also Conley v. Crabtree*, 14 F.Supp.2d 1203, 1204 (D. Or. 1998).

1 *see also Conley v. Crabtree*, 14 F.Supp.2d 1203, 1204 (D. Or. 1998). If the Court rejects
 2 the credibility findings of the magistrate judge, a de novo hearing is required. *United*
 3 *States v. Ridgway*, 300 F.3d 1153, 1157 (9th Cir. 2002).

4 **FACTUAL BACKGROUND**

5 Neither party objected to the Magistrate Judge's findings of fact. The factual
 6 background contained in Magistrate Rateau's R&R (Doc. 60) is adopted as supplemented
 7 by the additional facts in this Order.

8 **DISCUSSION**

9 Defendant's Objection presents two arguments: (1) the search of Defendant's cell
 10 phone following his arrest at the border was an unconstitutional, warrantless search; (2)
 11 the search of Defendant's cell phone was an investigatory search, not a border search.

12 **1. The government did not need a warrant to search Defendant's cell phone**

13 The government has authority to conduct routine searches and seizures at the
 14 border, without probable cause or a warrant. *United States v. Flores-Montano*, 541 U.S.
 15 149, 153 (2004). Although the United States Supreme Court noted in *Flores-Montano*
 16 that there are "reasons that might support a requirement of some level of suspicion in
 17 [border searches involving] highly intrusive searches of the person - dignity and privacy
 18 interests of the person being searched," *id.* at 152, the Court has not defined "whether,
 19 and under what circumstances, a border search might be deemed 'unreasonable' because
 20 of the particularly offensive manner in which it is carried out." *United States v. Seljan*,
 21 547 F.3d 993, 1000 (9th Cir. 2008). "The reasonableness of a search or seizure depends
 22 on the totality of the circumstances." *United States v. Cotterman*, 709 F.3d 952, 960 (9th
 23 Cir. 2013). Applying this test, the Ninth Circuit has held that reasonable suspicion is not
 24 required for customs officials to search a laptop or other personal electronic storage
 25 device at the border where the search consists of powering on a laptop, opening folders
 26 and opening files. *See United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008).
 27 Reasonable suspicion is required, however, for a computer search that begins as a cursory
 28 review at the border but transforms into a forensic examination of the computer's hard

1 drive. *Cotterman*, 709 F.3d at 957.

2 Under this body of case law, the search of Defendant's phone was permissible
3 under the border search exception. First, Agent Woods' search of Defendant's phone
4 consisted of a manual inspection of the text messages and photos within the phone. (TR
5 11/7/16, pg. 10, lines 14-19.) Because Agent Woods' search was akin to the opening of
6 folders and files at issue in *Arnold*, no reasonable suspicion was required. Agent Woods
7 did not engage in a forensic inspection of Defendant's phone such that reasonable
8 suspicion was required under *Cotterman*. 709 F.3d at 967 (distinguishing between a
9 manual review of files on an electronic device, which does not require reasonable
10 suspicion, and application of computer software to analyze a hard drive, which does).
11 However, even if reasonable suspicion was required to search Defendant's cell phone,
12 Agent Woods' search would have been supported by reasonable suspicion in light of the
13 fact that Agent Woods knew that agents had discovered a large amount of cocaine and
14 methamphetamine in Defendant's car and knew that drug trafficking organizations often
15 communicate using cellular phones. (TR 11/7/16, pgs. 16-18, 36.) See *Cotterman*, 709
16 F.3d at 968 (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) for the principle
17 that reasonable suspicion is defined as "a particularized and objective basis for suspecting
18 the particular person stopped of criminal activity.").

19 Defendant argues that the requirements for cell phone searches at the border have
20 been altered by the United States Supreme Court's decision in *Riley v. California*, 134 S.
21 Ct. 2473, 2482 (2014). In *Riley*, the Supreme Court held that a warrant is required for the
22 search of a cell phone incident to a lawful arrest. The Court reasoned that courts
23 "generally determine whether to exempt a given type of search from the warrant
24 requirement 'by assessing, on the one hand, the degree to which it intrudes upon an
25 individual's privacy and, on the other, the degree to which it is needed for the promotion
26 of legitimate governmental interests.'" *Id.* at 2484 (citing *Wyoming v. Houghton*, 526
27 U.S. 295, 300 (1999)). In *Riley*, the Court identified officer security and preservation of
28 evidence as the legitimate government interests supporting a search incident to arrest.

1 Balancing these interests against an individual's privacy interests in a cell phone, the
2 Court found that the governmental interests were minimal, given that digital data stored
3 on a cell phone cannot itself be used as a weapon to harm an arresting officer or to
4 effectuate the arrestee's escape, and that the risk of destruction of evidence is low once
5 law enforcement officers have secured a cell phone. *Id.* at 2485-86. The Supreme Court
6 gave considerable weight to the privacy interests inherent in cell phones, stating that "a
7 cell phone search would typically expose to the government far more than the most
8 exhaustive search of a house: A phone not only contains in digital form many sensitive
9 records previously found in the home; it also contains a broad array of private
10 information never found in a home in any form—unless the phone is." *Id.* at 2491.

11 *Riley* did not address whether a warrant is required for the manual search of a cell
12 phone at the border, but under the balancing test set forth in *Riley* this Court concludes
13 that a warrant was not required in order for Agent Woods to manually search Defendant's
14 cell phone. The governmental interest at stake in a border search is "rooted in 'the long-
15 standing right of the sovereign to protect itself by stopping and examining persons and
16 property crossing into this country.'" *Cotterman*, 709 F.3d at 960 (citing *United States v.*
17 *Ramsey*, 431 U.S. 606, 616 (1977)). Border searches are generally deemed reasonable
18 simply by virtue of the fact that they occur at the border, and individual privacy rights
19 must be balanced against the sovereign's interests. *Cotterman*, 709 F.3d at 960. That
20 balance "is qualitatively different ... than in the interior" and is "struck much more
21 favorably to the Government." *Id.* On the other side of the balancing test, the *Riley*
22 Court gave weight to "the storage capacity of cell phones" and the "interrelated
23 consequences for privacy," such as the collection of many distinct types of information in
24 one place, the ability to reconstruct the owner's private life through photographs, and the
25 potential for long-term data storage. *Riley*, 134 S. Ct. at 2489. Those same privacy
26 interests were at issue in the forensic search of a laptop in *Cotterman*. 709 F.3d at 964
27 ("laptop computers, iPads and the like are simultaneously offices and personal diaries.
28 They contain the most intimate details of our lives: financial records, confidential

business documents, medical records and private emails.”) The Ninth Circuit in *Cotterman* balanced the privacy interests associated with forensic examination of a laptop against the government’s interest in a secure border and concluded that only reasonable suspicion was required to justify the forensic examination. In light of that holding, and given the similarity between the privacy interests at stake in the search of a cell phone and the forensic examination of a laptop, the Court concludes that *Riley’s* warrant requirement does not implicitly overrule *Cotterman* or otherwise extend to the case at bar.²

2. Although Defendant had been arrested and detained before the search was conducted, the search was a border search

Defendant contends that a border search extends only to suspected contraband seized at the border and because agents had discovered drugs in his vehicle hours prior to searching his cell phone, the search of his cell phone was an investigatory search incident to his arrest, not a border search.³ The Court disagrees. Agent Woods’ testimony establishes that the search of Defendant’s cell phone was a border search for contraband; Agent Woods testified that he searched Defendant’s cell phone for “any implicating messages or evidence of the crime at hand *and also of anything that might allude to or evidence of a separate criminal nature.*” (TR 11/7/16, p. 11 (emphasis added).) Agent Woods further explained that “evidence of a separate criminal nature” could include child

² In *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016), the Ninth Circuit extended the holding in *Riley* to a probation officer’s search of a probationer’s phone, concluding that a warrant is required even though a probationer’s status as a probationer significantly diminished his Fourth Amendment rights. Defendant argues that this Court should apply *Riley* to the border search context just as the *Lara* court applied *Riley* to the probation search context. Although *Lara* and this case involve similar privacy interests in electronic devices, the governmental interests at stake in *Lara* -- combating recidivism and helping probationers integrate back into the community -- are not as compelling as the governmental interest at issue here: a secure border. Thus the outcome of the balancing test in *Lara* is not determinative of the outcome of the pending Motion.

³ This issue was not fully briefed during the report and recommendation proceedings: Defendant raised this issue in his Motion to Suppress Evidence, the government did not address the issue in its response to the Motion, Defendant did not re-urge the issue in his reply, and the Magistrate Judge did not discuss the issue in her decision. Both parties did some briefing of the issue in the objection and response to the R&R.

1 pornography or “something not as ... blatant [that] might have just furthered a separate
2 criminal investigation.” (TR 11/7/16, pgs. 11-12.) *See Arnold*, 533 F.3d at 1008
3 (reasonable suspicion is not required for customs officials to search a laptop or other
4 personal electronic storage device at the border where the search consists of powering on
5 a laptop, opening folders and opening files in search of child pornography).

6 Defendant does not cite to, and this Court is not aware of, any case law holding
7 that the border search exception only applies to the first contraband discovered. Because
8 the primary purpose of a border search is to seize contraband property sought to be
9 brought into the country, *see United States v. Guzman-Padilla*, 573 F.3d 865, 877 (9th
10 Cir. 2009), the government may search wherever evidence of contraband may be found,
11 so long as the scope and duration of the search is reasonable. *Cotterman*, 709 F.3d at
12 960.⁴ The Ninth Circuit has held that a border search was reasonable in scope where
13 agents took apart a car, *see United States v. Guzman-Padilla*, 573 F.3d 865, 879 (9th Cir.
14 2009) (collecting cases authorizing suspicionless disassembly of a vehicle), and when
15 agents manually searched the files within a laptop. *See Arnold*, 533 F.3d at 1009
16 (approving unintrusive search of laptops as reasonable). Here, by searching Defendant’s
17 cell phone text messages and photos, Agent Woods could have uncovered text
18 communications or photographs indicating that additional contraband was entering the

19
20 ⁴ Defendant argues that, unlike *Cotterman*, where the suspected contraband was
21 the digital data, the suspected contraband at issue in this case was the drugs, and thus, the
22 purpose of the government’s search of the cell phone did not flow directly from the
23 purposes of the border search exception. (Doc. 64, pp. 7-8.) This argument is not sound.
24 First, as acknowledged by the Defendants, a proper purpose of a border search is to
25 discover contraband. *Cotterman* and *Arnold* make evident that electronic devices such as
26 phones can contain contraband. Thus, Agent Woods was entitled to search for contraband
27 on Defendant’s phone. Second, the fact that contraband was not found in Defendant’s
28 cell phone, does not demonstrate that Agent Woods’ search did not flow directly from the
purposes of the border search exception. The reasonableness or purpose of a search
cannot be measured in hindsight by the fruits of the search. Third, an officer’s subjective
purpose in conducting a search is not relevant to determining whether a search is
constitutionally permissible. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (“Fourth
Amendment reasonableness ‘is predominantly an objective inquiry’”; “We ask whether
‘the circumstances, viewed objectively, justify [the challenged action.]’ If so, that action
was reasonable ‘whatever the subjective intent’ motivating the relevant officials.”).
Rather, as noted above, the reasonableness of a border search depends on the totality of
the circumstances, including the scope and duration of the deprivation. *Cotterman*, 709
F.3d at 960.

1 country in conjunction with the contraband Defendant was transporting, or that
2 Defendant was smuggling contraband in locations that the government had not yet
3 searched.⁵

4 Finally, the fact that the search of Defendant's cell phone may have occurred two
5 hours after Defendant entered the Port does not compel the conclusion that the search was
6 unreasonable.⁶ There is no precise time limit on when a border search must be
7 completed. *See Arnold*, 533 F.3d at 1005 (affirming suspicionless search of laptop and
8 detention that lasted "several hours.") The Ninth Circuit has upheld border searches as
9 reasonable except where the search involved the destruction of property, was conducted
10 in a particularly offensive manner, or was highly intrusive -- the concerns identified by
11 the Supreme Court. *United States v. Seljan*, 547 F.3d 993, 1002-03 (9th Cir. 2008) (en
12 banc) ("Even when we have recognized the possibility that there might be a limit of the
13 permissible scope or manner of a given [border] search . . . we have usually concluded
14 that the limit had not been exceeded, consistent with the Supreme Court's conclusion that
15 the government's authority to search at the border is broad and 'at its zenith.'") The
16 Ninth Circuit has "considered the question of whether a prolonged detention pursuant to a
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18 ⁵ Agent Woods testified that by the time he searched Defendant's cell phone, he
19 knew that 21 packages of illegal drugs had been discovered in the front passenger seat
20 and rear seats of Defendant's vehicle. (TR 11/7/16, p. 7.) It is unclear from the record
whether customs officials had completed an exhaustive search of Defendant's vehicle
prior to Agent Woods' inspection of Defendant's cell phone.

21 ⁶ Although the Government was unable to establish precisely how much time
22 elapsed between Defendant's arrival at the Port of Entry and Agent Woods' search of
23 Defendant's phone, a reasonable inference from the testimony is that the search occurred
24 within two hours of Defendant's entry. Defendant suggests that it could have been an
25 hour and a half after Defendant first arrived at the Port of Entry or longer. (Doc. 64, p.
26 9.) The government suggests that it is reasonable to conclude that the phone was
27 reviewed an hour and a half to two hours after the Defendant entered the Port. (Doc. 74-
28 1, p. 6.) The parties agree that: the Defendant arrived at the Port of Entry at 10:39 a.m.;
Defendant invoked his rights at approximately 12:15 p.m.; Agent Woods asked
Defendant outside of the interview whether the phone belonged to Defendant and, after
Defendant said that it was, Agent Wood went through the phone by hand. (Doc. 60 p. 3.)
Agent Woods testified that the first thing he typically does if there's a phone involved is
to manually go through it to see if there's anything relevant to the crime at hand or any
other potential criminal violations (TR 11/7/16, p. 41, lines 14-22); however, Agent
Woods could not recall whether he conducted the cell phone search after he asked the
Defendant if it was his phone. (Doc. 60, p. 3.)

suspicionless border search might be unreasonable, without finding that it was.” *Id.* at 1003 (citing *United States v. Gonzalez-Rincon*, 36 F.3d 859, 861, 863-64 (9th Cir. 1994) (upholding border search where the defendant was detained for several hours to monitor her bowel movements.)) The Court notes that during the two-hour time period at issue in this case, officers x-rayed Defendant’s vehicle, searched the vehicle, identified anomalies, and extracted 19 packages of cocaine and two packages of methamphetamine concealed within the front and rear seats of the vehicle. The fact that Agent Woods may not have searched the phone until two hours after Defendant entered the Port, or after Defendant had been placed under arrest, does not, under the facts of this case, convert the search of the phone from a border search to a search incident to an arrest. *See United States v. Ramos*, 190 F. Supp. 3d 992, 999 (S.D. Cal. 2016) (finding no legal authority or reasoning supporting the proposition that a border search is converted into a search incident to arrest once the arrest occurs at the border).

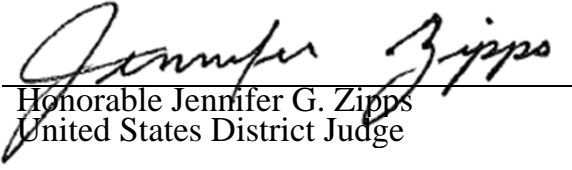
For the foregoing reasons, the Court concludes that the search of Defendant’s cell phone was reasonable.

CONCLUSION

Based on the Court’s independent review of the pleadings, exhibits and transcript, IT IS HEREBY ORDERED that:

1. The Report and Recommendation (Doc. 60) is ADOPTED;
2. Defendant’s Motion to Suppress Statements (Doc. 46) is GRANTED;
3. Defendant’s Motion to Suppress Evidence (Doc. 39) is DENIED.

Dated this 9th day of March, 2017.


 Honorable Jennifer G. Zipps
 United States District Judge